

Inner City Press
Community on the Move
&
Inner City Public Interest Law Project

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March 26, 1998

VIA FEDERAL EXPRESS

Federal Communications Commission
Attn: Magalie Roman Salas
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Attached Petition to Deny Applications of AT&T Corp.
and Teleport Communications Group, Inc. to Transfer
Control of Teleport to AT&T (CC Docket No. 98-24)

Dear Secretary Salas:

On behalf of Inner City Press/Community on the Move and its members and affiliates, including the Inner City Public Interest Law Project ("ICP"), attached please find a timely petition to deny the above-captioned Applications. For the reasons set forth in the attached, the Applications should be denied.

An original and twelve (12) copies of the petition to deny are enclosed for filing. Copies of the petition to deny have also been mailed as specified in the Commission's public notice of February 25, 1998. ICP is also providing a courtesy copy of this petition to deny to the AT&T staffer who sent a copy of the Application to ICP. Please date-stamp the enclosed extra copy of the petition to deny and return it in the self-addressed stamped envelope provided herein.

If you or any staff member of the Commission have any questions, please do not hesitate to telephone me at ICP's offices, at (718) 716-3540.

Very Truly Yours,
Matthew Lee
Matthew Lee
Executive Director

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 27 1998

REG MAIL ROOM

In the Matter of

Applications of AT&T Corp. and Teleport)	CC Docket
Communications Group, Inc., to Transfer)	No. 98-24
Control of Teleport to AT&T Corp.)	

Petition to Deny

filed by

Inner City Press/Community on the Move
& Inner City Public Interest Law Project

March 26, 1998

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& Inner City Public Interest Law Project
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On behalf of Inner City Press/Community on the Move and its members and affiliates, and the Inner City Public Interest Law Project (collectively, "ICP"), a consumers' organization headquartered in the Bronx, New York, with members in throughout New York and other states, this is a petition to deny the Applications of AT&T Corp. ("AT&T") and Teleport Communications Group, Inc. ("TCG" or "Teleport") for transfer of control of Teleport to AT&T.

The bases of this petition to deny are as follows: while AT&T claims that its entry into local markets via proposed purchase of Teleport is in the public interest, it is clear that Teleport targets its services to businesses and relatively affluent (and disproportionately non-minority) residential customers. The litmus test of this

can be found in New York City. Both AT&T's application to the Federal Communications Commission (the "FCC" or the "Commission"), and an AT&T March 5, 1998, Letter to ICP purporting to address the concerns ICP has expressed to AT&T argue that Teleport's criteria/targets for service are "business customers and... multiple dwelling units in the higher density markets." FCC App. at 8. But what cannot be missed is that "multiple dwelling units in high density markets" would, in New York City, include low income, predominantly minority communities like the South Bronx, Harlem, East New York and other parts of Brooklyn (each with some of the highest concentrations of high rise public housing in the nation). In fact, Bronx County, and especially the South Bronx, has the lowest rate of homeownership, and the highest rate of multifamily housing (and thus of "high density") in the New York area.

Teleport, however, is not serving the high density, predominantly multifamily communities. This pattern also exists, and should be inquired into by the FCC, for example in the New Jersey counties of Middlesex, Somerset, Mercer and Morris (see *infra*), in Miami, Florida, and in Connecticut counties of New Haven, New London, Fairfield, Litchfield and Hartford (given Teleport's claimed focus on "multifamily units in high density areas," its exclusion of such high minority counties as The Bronx, while running a fiber and other network in Litchfield County, Connecticut, is indicative of the pattern ICP is highlighting to the FCC). It is inescapable that Teleport's criteria has less to do with the density of population, or the percentage of buildings that are apartment buildings, than it does with the income of the residential customers targeted, which

fails any legitimate application of the (disparate) impacts test.¹

A Congressional purpose of the Telecommunications Act of 1996 (the "1996 Act") was/is to provide the benefits of competition and better and more affordable service to ALL Americans, and not only to business owners (in relatively affluent communities) and to affluent, predominantly non-minority residential customers. For this reason, a major purported entry into local markets by a long-distance player like AT&T should not be approved unless it will foreseeably result in benefits to a fair cross section of the residents of the affected markets. Particularly where the target (and strategy) to be acquired blatantly excludes lower income, more predominantly minority communities, in contradiction to the proffered rationale ("multifamily units in higher density markets"), AT&T's and certain others' applications to enter local markets should not be unconditionally approved. (The FCC should note, for example, that SBC, Inc. and SNET, in their Application to the FCC at 9 and 31, n.36, use the AT&T - Teleport proposal as a rationale for their combination, stating [at 9] that "the SNET Telco is too small to be able to compete effectively with its principal competitors, which are growing even larger through recently announced mergers...[AT&T] announced on January 8, 1998, its plans to acquire [TCG]. Both of those companies are already competing in Connecticut's local market...").

¹ Targeting and/or excluding on the explicit basis of income may run afoul of the "effects" or disparate impact test applicable to prevent seemingly permissible business practices from having unnecessary discriminatory effects in fact. The test has been successfully applied in the fields of employment, housing and consumer credit for years; it is applicable to the various telecommunications product markets at issue here.

The FCC should consider, as confirming ICP's assertions regarding the (negative) precedential nature of this AT&T-Teleport proposal, the following: Local Services Competition Isn't Hitting Home -- AT&T's Acquisition of Teleport Reinforces Shift Toward Corporate Customers, InternetWeek, February 2, 1998, at T13: "Hope for the rapid spread of competition in local residential telephone service continues to wane as the industry enters Year 3 of the Telecommunications Act... The shift toward business customers was underscored last month with AT&T Corp.'s \$11.3 billion agreement to acquire [TCG]..."

Also to be addressed: AT&T despite its recent (and as yet unproven) steps against slamming, has been a major "slammer" in New York. See, e.g., NY Regulators May Pursue Penalty Against AT&T, Reuters, Feb. 19, 1998: "In a statement released Wednesday, the [Public Service Commission] said slamming complaints against AT&T declined only slightly after the company filed a corrective plan in June 1997, but complaints have started to increase again. The commission... said it has received 371 slamming complaints against AT&T since June 1997..." This adverse managerial issue must be addressed in this proceeding, and, along with the other grounds set forth herein, militate for a hearing and for denial of the application.

Furthermore, despite AT&T's bare-bone filing with the FCC, there ARE competitive issues that must be considered in this proceeding. TCG was one of the first CLECs in New York or elsewhere; not only is it significant that TCG has YET to meaningfully serve/compete for residential customers, particularly in lower income, more predominantly minority communities -- it also must be noted that AT&T purported to be competing for local service in New York, and now

withdraws from competition by re-selling (which could, as the FCC has noted, more quickly bring competition to residential consumers), and buys one of the longest standing CLEC (with the record cited above). Under established FCC antitrust doctrines (including potential and other competition), these issues must be considered and addressed.

Strikingly, AT&T's application to the FCC, at least as provided to ICP, is informationally incomplete; its purported showing of public interest is entirely conclusory, occupying less than two pages, and, at noted above, mischaracterizing TCG's criteria for targeting of residential customers. Approval of this merger, as proposed, would not secure for, but would rather deny to "the public the broad aims of the Communications Act."

Western Union Division, Commercial Telegraphers' Union, A.F. of L. v. United States, 87 F.Supp. 324, 335 (D.C.C.), *aff'd*, 338 U.S. 864 (1949). Expedited treatment of the applications would be inappropriate; the Applications should be amended or supplemented, and/or a hearing (which ICP is requesting) should be held on these issues. As currently proposed, this merger should be denied.

Procedural Posture/ICP's Request for Information from AT&T

On February 25, 1998, the Federal Communications Commission (the "FCC" or the "Commission") issued a public notice of AT&T's applications to acquire Teleport and its licensed and authorizations, and setting the deadline for the filing of petitions to deny and/or comments as March 27, 1998. This petition to deny, which is being sent to the Secretary of the FCC by Federal Express on March 26, 1998, is timely.² While the FCC's February 25, 1998, public

² ICP is also providing a courtesy copy of this petition to deny to the AT&T representative who sent a copy of the

notice did not specify a deadline for reply comments, ICP hereby informs the Commission of its intent and desire to file a reply to whatever opposition or response the Applicants may file, within two weeks of April 27, 1998.

Also note that ICP raised at least two of these issues (TCG's focus on businesses and affluent, predominantly non-minority residential customers, and AT&T's slamming) to AT&T in a letter dated March 2, 1998. AT&T responded by letter dated March 5, 1998, which letter simply repeated, verbatim, the scanty argument in the FCC application, and stated that AT&T "believe[s] that the applications demonstrate convincingly that this transaction is in the public interest and will benefit all consumers...". Compare this empty assurance to, e.g., The Palm Beach (FL) Post of March 11, 1998: "AT&T downplays the significance of local residential service in its deal for Teleport, saying it's mainly interested in lucrative business customers" (further discussed infra). The Application does NOT demonstrate, much less "convincingly," that this acquisition would be in the public interest. Thus, ICP files this timely petition to deny / request to dismiss the Application or schedule a hearing thereon.

The Commission's Duties in this Proceeding

Pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended (the "1934 Act"), the Commission can not approve the transfer of licenses and other authorizations that underlie the proposed merger unless the Commission finds, on substantial evidence, that the transaction is in the public interest, convenience and

Application to ICP, and ICP is faxing a courtesy copy of this petition to deny to the FCC at fax number (202) 418-2345. This petition to deny is timely.

necessity. Under this public interest standard, Applicant must show *inter alia* that their proposed combination (1) would further the implementation of Congress' "pro-competitive, de-regulatory national policy framework" for telecommunications, and (2) would "preserv[e] and advanc[e]" universal service. See, e.g., In Re Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries, Memorandum Opinion and Order, File No. NSD-L-96-10, FCC 97-286 (released August 14, 1997) (the "BA/NYNEX Order") at Para. 2 and notes 3 and 4 thereto. This standard is to be "so construed as to secure for the public the broad aims of the Communications Act." See, e.g., Western Union Division, Commercial Telegraphers' Union, A.F. of L. v. United States, *supra*.

ARGUMENT

TCG HAS HAD 14 YEARS TO COMPETE FOR OR SERVE RESIDENTIAL CONSUMERS IN LOWER INCOME, PREDOMINANTLY MINORITY COMMUNITIES, AND HAS NOT DONE SO; ACQUISITION OF TCG BY AT&T, AND REWARD FOR TCG'S OWNERS, WOULD DO NOTHING TO FORWARD, AND WOULD CONTRADICT, THE GOALS OF THE 96 ACT

TCG was created in 1984, by AT&T "alumnus" Robert Annunziata. From the beginning, TCG targeted business customers -- but, as has become more and more prevalent among CLECs (particularly those hoping to sell out at a premium to AT&T, WorldCom, Sprint, and others), TCG always claimed that it would one day serve, and bring the benefits of competition to, a broad base of residential customers.

In the TCG context, "business" means big business: the New York Mercantile Exchange, European American Bank, Avis, etc.. While TCG began in New York City (in the least

predominantly minority, least urban of its boroughs, Staten Island),³ TCG's attempts to serve moderate income New Yorkers has been negligible -- before offering any such service, TCG took its business show on the road to 65 other cities, and bought an internet company on the west coast, CerfNet.

In fact, TCG, which has yet to serve moderate income, predominantly minority communities in its home city of NYC, now claims to be planning residential service in more affluent areas in Florida. See, e.g., J. Murawski, Teleport to Offer Local Telephone Service, Palm Beach (FL) Post, March 11, 1998: "Teleport, based in Staten Island, N.Y., says it will begin in Miami and expand to Fort Lauderdale and West Palm Beach." Compare the demographics of the outer boroughs of NYC, particularly the Bronx and East Brooklyn, to Fort Lauderdale and West Palm Beach -- or to, in New Jersey's Middlesex, Somerset, Mercer and Morris counties (see Asbury Park Press of August 12, 1998).

After more than a decade, TCG finally began offering residential service to some in New York. TCG claims to be providing local residential service to 3,000 customers in New York. *Id.* Further information about these customers, by geography, etc., needs to be submitted in this proceeding. TCG (and AT&T) claim that its target market for residential service is multi-family units in high density areas. App. at 8. But in ICP's and its members' experience, this is not the case. TCG competes for residential customers, if at all, in the most affluent

³ Based on Staten Island, TCG targets Manhattan and parts of Brooklyn (see, e.g., American City & County of March 1998), but excludes The Bronx, except for a once-a-year free calls for senior citizens (see, e.g., N.Y. Daily News of December 4, 1997). While certainly a nice, once a year program, this is NOT the benefits to all Americans that Congress had in mind with the 1996 Act. See *infra*.

areas, in new construction condominiums, for example.⁴ It is not even entirely clear that TCG's targeting is justified by its wiring infrastructure (in fact, it does not appear to be so, based on ICP's and its members' review of the buildings to which TCG targets its services). This could (and should) be addressed/responded to by AT&T and TCG, in this proceeding; the FCC itself should conduct / allow ICP to conduct, at a hearing and pre-hearing discovery, such an inquiry.

The locations of TCG's fiber and cable, and the type of residential consumers it targets, should be inquired into in light of the following: "at a telecommunications conference last week, [AT&T's] chief financial officer said Teleport's fiber optic lines could be used easily to serve nearby residents." If the location of TCG's fiber optics lines disproportionately exclude or bypass minority communities (as is the case in NYC), this may well fail a disparate impact discrimination test. And that is even IF TCG's targeting corresponds solely and directly to the location of its fiber optic cables. In fact, ICP's and its members' experience is that TCG's targeting is even more disparate than the location of its fiber optic lines would lead one to expect / require.

ICP directs the Commission to, and asks the Commission to re-create, or direct AT&T or Teleport to re-create, the type of geographic analysis (including by race/national

⁴ Beyond ICP's and its members' experiences, consider also Crain's New York Business of January 19, 1998, Telcos Answer Landlords' Local Demands: "'High-speed Internet access and intercom service get negotiated pretty hard,' says John Reiser, vice president for residential services for Teleport. 'A lot of these building are targeting young professionals.'" For the record, ICP would like to depose, or for the FCC to depose, Messrs. Reiser, Somers, Atkinson, Annunziata -- and Armstrong -- on these issues, to develop the factual record, which is insufficient. See *infra*.

origin of census tract or zip code) recently submitted to the Commission in the WorldCom - MCI proceeding (as an Exhibit to the March 13, 1998, submission of a petitioner to deny therein).

That study, created by InContext,⁵ 1615 L Street, Washington, D.C. 20036, plots applicants' competitive fiber lines and buildings onto a map showing racial demographics and distribution of businesses.

ICP staff have spoken with the principals of InContext, and have been informed how relatively straight-forward (yet still admittedly beyond ICP's resources) such a study is. Business data is available from Dun & Bradstreet, race / national origin information from the Census Bureau. Determining the precise location of TCG's fiber lines is not as straight forward for ICP (TCG should be required to disclose this information in this proceeding). InContext informs ICP that this information is obtainable by inquiries with municipalities, including their agencies which issue building/digging permits.

It appears that, in many markets, the supposedly competing CLECs simply following existing fiber rights-of-way of the ILECs and CLECs, and thus choose to compete for small percentages of markets already benefiting from competition, while leaving lower income, more predominantly minority communities devoid of any benefit of competition, service or of the intended benefits of the 1996 Act.

While this may be a nationwide, and not only urban, problem (ICP is informed that few to no CLECs have sprung up, entered, or chosen to compete in communities in such lower income states as Montana, Wyoming, New Mexico, etc.), that moderate income consumers even in a telecommunications

⁵ InContext prepared this study for an unnamed client (not the petitioner to deny); it has entered the public record.

capital like New York City are not receiving any increased service or competition -- raises deep questions about the efficacy of current implementation of the 1996 Act.

AT&T's proposed acquisition of TCG for more than \$11 billion is a (negative) watershed -- if TCG's stock owners (including cable companies which themselves are excluding lower income, more predominantly minority communities) are allowed to profit so handsomely, after 14 years of redlining, this will only encourage (1) existing CLECs to ignore lower income, more predominantly minority communities, and (2) emerging CLECs to target only businesses and affluent, predominantly non-minority residential consumers, hoping to sell out quickly to larger players who, rather than competing on a broad basis, snap up redlining CLECs and then claim to be serving all or most residential markets. This will be argued to be an indicator of effective local competition, and the BOCs / ILECs will then get what they really want -- ability to enter long distance. Meanwhile, large segments of the population -- the urban poor and minorities, and rural communities -- will have seen no benefit at all from the 1996 Act, will be left further and further behind, festering in a polarized society legitimized by rubber stamp regulatory approval for all but the largest, most obviously anticompetitive mergers. Approval of this acquisition is not in the public interest.

THIS PROPOSED MERGER WOULD **NOT**
"PRESERV[E] AND ENHANC[E] UNIVERSAL SERVICE"

Both for the reasons set forth immediately above (Teleport's disproportionate, and, in light of its claimed criteria, disingenuous, exclusion of lower income communities of color from service and competition), and

otherwise, this proposal does not pass one of the essential prongs of the FCC's current public interest test: that proposed transfers of licenses and mergers such as this "preserv[e] and enhanc[e] universal service." See *supra*.

As sketched above (ICP is under no duty to, and in fact cannot, plead with greater specificity, given the lack of detail of AT&T's application), this proposal would further a trend -- the (telecom / information) rich get richer; the (telcom / information) poor get poorer -- that runs afoul of, and is inconsistent with, a major focus of universal service.⁶

This proposed merger would not preserve much less enhance the principles of universal service. On this ground, either the Applications should be amended or supplemented, a hearing should be held, or the Applications should be denied.

"CONDITIONS" WOULD NOT BE SUFFICIENT

In approving the applications of Bell Atlantic / NYNEX and BT/MCI, the Commission conditioned its approvals on the imposition and acceptance of numerous "pro-competitive" and/or public interest conditions. The Commission stated that even after Bell Atlantic's July 19, 1997 series of commitments, that merger remained "a close case." BA/NYNEX

⁶ It is also noted that the FCC is "reducing contributions by AT&T Corp and MCI Communications Corp." by "ramping down the start-up of this [wiring schools and libraries for the internet] program" by one-third in the first half of 1998. Reuters newswire of Dec. 15, 1997, 19:11 EST. Concern has been raised about certain major carriers' non-public communications with the FCC leading up to the "ramping-down" of funding for the schools / libraries portion of universal service -- see, e.g., CyberTimes, <<http://nytimes/library/cyber/week/122397fcc.html>>.

Order at Para 12. Similarly, the Commission only approved the (now apparently moot) British Telecom/MCI proposal "subject to conditions and safeguards that ensure the merger will enhance competition in the United States." FCC Press Release of August 21, 1997, 1997 WL 476070.

The Commission should take notice that the conditions it imposed in the one of these two mergers which has actually been consummated (i.e., Bell Atlantic/NYNEX) are, even according to MCI, not being complied with. MCI has already filed a formal complaint with the Commission charging that Bell Atlantic has violated one of the conditions of its merger with NYNEX, calling for the local carrier to connect rivals carriers to its networks at "forward looking" economic costs. (ICP believes that AT&T has made and lodged similar complaints). The area (and number of consumers) affected by the alleged violation of the condition is by no means small: it involves local networks and consumers in Pennsylvania, New Jersey, Delaware, Maryland, Virginia, and the District of Columbia. See, e.g., the Associated Press newswire of Dec. 22, 1997, 15:33 EST.

The hypothetical conditions which might attempt to address the anticompetitive and other adverse effects of this WorldCom/MCI proposal would have to be even more expansive (and also harder to enforce) than those that MCI and others claim that Bell Atlantic has already violated. This calls into question whether conditions could render this proposal in the public interest, convenience and necessity.

Recent announcements, including AT&T's with regard to local telephone service, undermine the claimed benefits. See Associated Press newswire of Dec. 19, 1997, 18:13 EST:

"One after the other, the nation's largest long-distance phone companies have pulled back from selling local phone services to residential customers... MCI Corporation... this past summer pulled back from the more difficult job of selling local phone service to homes... While a glum sign for consumers, the pullbacks have cheered investors worried that local markets are turning into money pits."

OTHER ISSUES WHICH MUST BE ADDRESSED

As demonstrated above, this proposal should be denied on anticompetitive, universal service and public interest grounds. There are, however, a number of other issues, including adverse managerial issues and effects on members of the public that must also be considered. For example:

AT&T's Slamming: AT&T despite its recent (and as yet unproven) steps against slamming, has been a major "slammer" in New York. See, e.g., NY Regulators May Pursue Penalty Against AT&T, Reuters, Feb. 19, 1998: "In a statement released Wednesday, the [Public Service C]ommission said slamming complaints against AT&T declined only slightly after the company filed a corrective plan in June 1997, but complaints have started to increase again. The commission... said it has received 371 slamming complaints against AT&T since June 1997..." This adverse managerial issue must be addressed in this proceeding, and, along with the other grounds set forth herein, militate for a hearing and for denial of the application.

ACC Corporation in Rochester, New York, in the process of being acquired by TCG, has canceled its agreement to acquire (and, it was claimed, improve) US Wats, Inc., headquartered in Pennsylvania. The unchecked deal-making (TCG to buy ACC;

AT&T to buy TCG) in fact disrupts those few smaller transactions that arguably would have resulted in increased capitalization, etc., of smaller players which might well compete for moderate income residential consumers.

ICP has learned that BellSouth has challenged AT&T's application, as inter alia informationally incomplete. See, e.g, Warren's Communications Daily of March 23, 1998. While ICP agrees that the Application, and its "public interest" argument, is woefully inadequate, ICP is asking the FCC to adopt, in this proceeding, a consumers' (as opposed to competitor's) perspective. ICP notes that BellSouth is attempting to use TCG's recent, and redlining, entry into Florida markets (see supra) as proof that it has competition for local service in Florida. See Palm Beach Post of March 11, 1998, supra. For the reasons explained above, competition for business and for affluent, predominantly non-minority residential customers is not full competition, and should not result in the BOCs and ILECs getting what they want (entry into local distance). If the FCC does not require some benefits to ALL communities and classes of consumers, now, those excluded will remain excluded.

See Communications Daily of February 19, 1998, AT&T Challenges RHC Arguments That Conn. Market Benefits From Competition: AT&T released study Tuesday that disputes Bell company arguments that Southern New England Telephone (SNET) long distance entry had produced lower prices and increased competition in Conn. and should be model for nation. [AT&T's] analysis by Lee Selwyn, of Economics & Technology, Boston, found SNET rates were identical to long distance carriers, and competition still was hindered by SNET control of market and lax regulatory policies. Selwyn said: 'Rather

than demonstrate any durable competitive benefit... the "Connecticut Experience" teaches volumes about the dangers of premature BOC long distance entry before local competition is given a chance to take root."

There ARE competitive issues, not addressed by AT&T's application: despite AT&T's bare-bone filing with the FCC, there ARE competitive issues that must be considered in this proceeding. TCG was one of the first CLECs in New York or elsewhere; not only is it significant that TCG has YET to meaningfully serve/compete for residential customers, particularly in lower income, more predominantly minority communities -- it also must be noted that AT&T purported to be competing for local service in New York, and now withdraws from competition by re-selling (which could, as the FCC has noted, more quickly bring competition to residential consumers), and buys one of the longest standing CLEC (with the record cited above). Under established FCC antitrust doctrines (including potential and other competition), these issues must be considered and addressed.

Further note that, given the lack of specificity of AT&T's application, no legitimate competitive analysis can be done. For example, AT&T CFO Dan Somers in March 1998 told a conference sponsored by Bloomberg LP that AT&T will begin offering local phone service in areas TCG already serves "once its deal for the company closed." Palm Beach Post of March 6, 1998, at 3D. These markets, and AT&T's precise plans, are not disclosed in the application. These plans SHOULD be disclosed, and scrutinized in light of the issues raised above.

CONCLUSION

For the foregoing reasons, AT&T's and Teleport's applications, and this proposed combination, should be denied by the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew Lee, do hereby certify that true and correct copies of the foregoing Petition to Deny were sent by first-class, postage prepaid mail, this 26th day of March, 1998, to the following:

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